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Nos. 91-120 and 91-130

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In the Supreme Court of the United States

OCTOBER TERM, 1991

HISPANIC BROADCASTING LIMITED PARTNERSHIP,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

HISPANIC BROADCASTING SYSTEMS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether disappointed applicants for a broadcast license who did not submit timely applications for the stations in issue can seek judicial review of the Commission's final decision allowing another party to retain its license.

2. Whether viewers of broadcast stations have standing to seek judicial review of a claim that the Commission erred in applying the restrictions on foreign control of broadcast stations set forth in 47 U.S.C. 310(b).

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-24a)[1] is reported at 931 F.2d 73. The order of the en banc court modifying that opinion

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[1] References to Pet. App. are to the appendix to the petition in No. 91-120.

(Pet. App. 25a) is unreported. The opinions of the court of appeals panel (Pet. App. 31a-69a, 28a-30a) are reported at 893 F.2d 1349. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 86a-113a) is reported at 2 F.C.C.R. 3336.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1991. Pet. App. 1a. The petitions for a writ of certiorari were filed on July 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the early 1980s Spanish International Communications Corporation (SICC) filed applications for renewal of licenses it held to operate certain television stations. Pet. App. 34a-35a. Under the Commission's rules, the filing of SICC's renewal applications opened a 90-day "window" for applications from other parties who desired to operate television stations on the frequencies in issue. See 47 C.F.R. 73.3516(e). At the time SICC filed its applications, the FCC was investigating whether SICC was controlled by aliens to an extent that would disqualify it from continuing as a broadcast licensee. See 47 U.S.C. 310(b). Accordingly, pursuant to 47 U.S.C. 309(e), the Commission in 1983 designated the renewal applications for hearing to explore the alien control issue. 48 Fed. Reg. 28,549 (1983). The designation order expressly noted that in the case of two of SICC's applications (involving stations in San Antonio and Phoenix), the 90-day window for filing competing applications had not yet closed. *Id.* at 28,549-28,550. Despite the possibility that SICC's

foreign control would cause it to be disqualified, no competing applications were received.

After the hearing, the administrative law judge concluded that the president of SICC was the representative of aliens, in violation of Section 310(b). The ALJ thus denied the renewal applications but recommended that SICC and the Commission explore the possibility of a corporate restructuring that would eliminate the perceived violation of Section 310(b) without requiring SICC to lose its licenses. See *Initial Decision*, FCC 86-D-1 (released Jan. 8, 1986), slip op. ¶ 194. SICC appealed the ALJ's decision to the Review Board.

While the appeal was pending, SICC and all the other parties to the hearing—including the party whose complaint about SICC's ownership had triggered the hearing—entered into a proposed settlement agreement. Under that agreement, SICC's renewal applications would be granted, subject to the condition that SICC sell the stations to an unrelated buyer, Hallmark Cards, Inc., a closely held corporation with no alien stockholders, directors, or officers.[2] The Review Board approved the settlement agreement and granted the renewal applications, conditioned on the proposed transfer. 1 F.C.C.R. 92 (1986).[3]

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[2] Although the alien control issue was tried with respect to all of the SICC stations, the Phoenix station was not part of this settlement agreement. See *Seven Hills Television Co.*, 2 F.C.C.R. 6867, 6868 (Rev. Bd. 1987), reconsideration denied, 3 F.C.C.R. 826 (Rev. Bd. 1988). Rather, the Phoenix station was the subject of a later settlement agreement that petitioners did not challenge. See *Seven Hills Television Co.*, 4 F.C.C.R. 4062 (1989).

[3] Because the Review Board approved the settlement agreement, it had no occasion to rule on SICC's appeal from the ALJ's decision that SICC was unqualified. Thus, the Com-

2. On the day the Review Board adopted its order approving the settlement agreement, petitioner Hispanic Broadcasting Systems, Inc. (HBS) sought to enter the proceeding for the first time by tendering applications for the SICC frequencies. Shortly thereafter, while the Commission was considering whether to uphold the Review Board's approval of the settlement agreement, petitioner Hispanic Broadcasting Limited Partnership (HBLP) also applied for the SICC frequencies. HBLP also claimed viewer standing to oppose the settlement, asserting that its general partner resided within the viewing area of one of SICC's stations.[4]

The Commission rejected the applications from HBS and HBLP as untimely. Pet. App. 90a-97a. The Commission nevertheless exercised its discretion to consider the arguments against the proposed settlement by treating the opponents' pleadings as amicus briefs. *Id.* at 98a. On the merits, the Commission agreed with the Review Board that the settlement was in the public interest, and it found that accepting the settlement would not undermine the agency's interest in deterring alien control of broadcast stations. *Id.* at 98a-110a.[5]

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mission never finally resolved the issue of SICC's qualifications. See Pet. App. 104a.

[4] Two other groups of alleged viewers, who appeared before the court below but have not sought review in this Court, also sought to enter the proceeding for the first time after the Review Board had approved the settlement, while the matter was pending before the Commission.

[5] SICC transferred the licenses to Hallmark shortly after the Commission approved the transfer applications. By acting at that time, Hallmark assumed the risk that it might have to vacate the licenses if the Commission's action was reversed on judicial review. See Pet. App. 28a-30a.

3. On appeal, the panel affirmed the Commission's decision to reject the HBS and HBLP applications as untimely. Pet. App. 46a-49a. A majority of the panel, with Judge Williams dissenting, nevertheless held that HBS and HBLP had standing to challenge the settlement because of their status as potential future applicants if the frequencies ultimately should become vacant. *Id.* at 41a-45a. On the merits of petitioners' challenge to the settlement, the majority remanded the decision for further proceedings, finding that the Commission had not adequately explained its application of the holding in *Jefferson Radio Co.* v. *Federal Communications Commission*, 340 F.2d 781 (D.C. Cir. 1964), that licensees whose qualifications are under investigation generally may not sell their licenses at full market value after a hearing regarding the qualifications has been designated. Pet. App. 49a-56a.

4. On rehearing en banc, the court of appeals dismissed petitioners' appeals from the Commission's decision to approve the settlement. Pet. App. 1a-15a. Relying on its decision in *Spanish International Broadcasting Co.* v. *Federal Communications Commission*, 385 F.2d 615 (D.C. Cir. 1967), the court concluded that "[a]n applicant for a broadcast license must file a timely application with the FCC before he may challenge an adverse Commission order in this court." Pet. App. 9a. The court explained that requiring applicants to participate in the administrative process would promote judicial efficiency by allowing agencies the first chance to assess the merits of an application. In this case, if petitioners had filed timely applications, they might have won the licenses without regard to the foreign control question regarding the competing applicant; alternatively,

their applications might have been rejected on the merits for reasons independent of the foreign control problem. *Id.* at 10a-11a.[6] The court concluded that "nothing in our decision prevents any person who feels aggrieved from appealing an order denying him party status in the administrative proceedings * * *. And if the agency's denial were in error, its denial of status would necessarily excuse later non-participation." *Id.* at 13a.[7]

Petitioner HBLP and others also claimed standing as viewers to challenge the settlement as inconsistent with the alien control provisions set forth in 47 U.S.C. 310(b). The court held that viewers do not have standing to raise this particular challenge because they are not the "intended beneficiaries" of Section 310(b). Pet. App. 13a-14a. The court explained that the provision "was designed to protect the entire nation * * * [by] keeping the airwaves available for military use in time of war," *ibid.*, and concluded that the alleged viewers could thus be seeking review only "as guardians of the national interest." *Id.* at 14a. In the court's view, this "generalized interest . . . is too abstract to constitute a 'case or controversy'

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[6] The court distinguished the "frequent" situation where "compliance with an agency's procedures would not have caused the agency to venture down a path that could have mooted the issue brought to court." The court approved of cases holding that exhaustion requirements are satisfied in those cases when the agency has a "fair opportunity" to address the party's claim. Pet. App. 11a-12a.

[7] Chief Judge Mikva dissented, arguing that petitioners adequately exhausted administrative remedies because the Commission had a fair opportunity to address their arguments, and in fact did address them. Pet. App. 16a-24a.

appropriate for judicial resolution." *Ibid.* (quoting *Schlesinger* v. *Reservists Committee To Stop the War*, 418 U.S. 208, 227 (1974)).[8]

ARGUMENT

1. Petitioners first challenge (91-120 Pet. 4-6; 91-130 Pet. 16-24) the court of appeals' narrow and "unsurprising" holding that "one who seeks to overturn a Commission licensing decision in the capacity of a disappointed applicant must actually apply [for the license], and must do so in timely fashion," Pet. App. 12a. As the court of appeals' treatment of the issue shows and as petitioners implicitly acknowledge, this particular problem arises quite rarely; petitioners can cite no case reaching a contrary conclusion.[9]

Contrary to the claim of petitioner HBLP (91-120 Pet. 4-5), the decision below is not inconsistent with the D.C. Circuit's decision to grant judicial review in

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[8] Because Chief Judge Mikva found that petitioners had standing as applicants, he had no occasion in his opinion at the en banc stage to address the question of viewer standing. His panel opinion, though, suggests that he agreed with the majority's approach. See Pet. App. 41a (noting that the claim of viewer standing "is problematic because there is no evidence to suggest that the anti-alien control provisions of the Act were implemented to advance the public's interest in programming content").

[9] As the court below took pains to emphasize (Pet. App. 13a), its ruling will not deprive parties in petitioners' situation of judicial review of the Commission's disposition of their request to participate in the licensing proceedings. Moreover, if the court ultimately concludes that the agency erred in declining to allow disappointed applicants to participate, the applicants would be entitled to judicial review of the merits of the proceeding from which they were excluded. See Pet. App. 13a; *FCC* v. *NBC, Inc. (KOA)*, 319 U.S. 239, 246-247 (1943).

Shurberg Broadcasting of Hartford, Inc. v. *Federal Communications Commission*, 876 F.2d 902 (D.C. Cir. 1989), rev'd on other grounds *sub nom. Metro Broadcasting, Inc.* v. *Federal Communications Commission*, 110 S. Ct. 2997 (1990).[10] In that case, as in this one, the Commission denied a party permission to participate in the proceedings on an incumbent licensee's renewal application. In that case, though, the denial was based not on the untimeliness of the application, but on the Commission's conclusion that even if Shurberg entered it would not receive the license, because the Commission planned to resolve the proceeding by a distress sale to a minority-owned entity. See *Faith Center, Inc.*, 99 F.C.C.2d 1164, 1166, 1170 (1984) (denying Shurberg's application). In that case, as in this one, the court of appeals concluded that the disappointed applicant was entitled to challenge his exclusion from the licensing proceeding. Because the court of appeals could not have reviewed Shurberg's exclusion without reviewing the merits of the Commission's decision, the court of appeals correctly reviewed Shurberg's claims regarding the merits of the Commission's decision. In this case, by contrast, the Commission's reason for rejecting petitioners' applications was not linked to the merits of the proposed settlement, so the court of appeals' review of that reason did not require it to consider petitioners' challenge to the merits of the proposed settlement.[11]

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[10] Even if the decision below did conflict with the D.C. Circuit's earlier decision in *Shurberg*, that by itself would not be an adequate reason for this Court to grant review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

[11] Petitioner HBLP also suggests (91-120 Pet. 5-6) that the en banc decision deprived it of due process by disposing

Petitioner HBS contends (91-130 Pet. 16-18) that 47 U.S.C. 405 effectively preempts the exhaustion field, so that judicial review is presumptively available to any party that meets the threshold requirements of that provision, however untimely the party's actions may be under the Commission's well-established procedures. But the text of the statute—which does not on its face mandate judicial review, but only lists certain minimum prerequisites for judicial review—does not require a result so inconsistent with an orderly administrative process. The cases on which petitioner relies (91-130 Pet. 17-18 nn.19-21) are inapposite; they involve general exhaustion principles and do not address petitioner's argument that Section 405 precludes courts from requiring parties to comply with agency procedures if they wish to challenge agency proceedings.

Petitioner HBS also argues (91-130 Pet. 18-21) that the decision of the court of appeals is inconsistent with the general purposes of the exhaustion doctrine, which it characterizes as limited to preventing premature judicial intervention in pending administrative proceedings and ensuring that agencies have an opportunity to pass on the questions parties wish to present to courts. See 91-130 Pet. 21. But peti-

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of the case on a ground on which the Commission did not seek rehearing, and which the parties neither briefed or argued. Assuming for the moment that petitioner's assessment of the facts is correct, its contention nevertheless is meritless. The court of appeals could have granted rehearing en banc even if no party had requested it. See *Western Pacific R.R. Corp.* v. *Western Pacific R.R.*, 345 U.S. 247, 262 (1953). There is no merit to petitioner's contention that the en banc court had *less* authority to select a ground of decision because it acted on a petition of one of the parties rather than entirely on its own motion.

tioner completely ignores the rationale of the court of appeals, which reasonably concluded that considerations of judicial and administrative efficiency support a rule requiring petitioners to comply with established deadlines in entering a proceeding they wish to challenge. None of the cases cited by petitioner have addressed or rejected that rationale.

2. Petitioner HBLP also contends (91-120 Pet. 6-13) that the court of appeals erred in holding that viewers do not have standing to challenge the Commission's action under Section 310(b).

Petitioner relies first (Pet. 7-8) on the Commission's apparent willingness to allow viewers to participate before the agency without limitation as to the issues they may raise. Petitioners' reliance is misplaced, though, because the Commission is not constrained by Article III "standing" requirements. See *California Association of the Physically Handicapped, Inc.* v. *Federal Communications Commission*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985). The Commission's willingness to entertain broad submissions from viewers in the public interest does not somehow grant all members of the public standing to obtain judicial review "simply because citizens are the ultimate beneficiaries of" our legal system, *Schlesinger* v. *Reservists Committee To Stop the War*, 418 U.S. at 227.

Petitioner HBLP also contends (91-120 Pet. 9-10) that the court of appeals erred by paying insufficient attention to "Congressional intent" and "the statutory scheme," and suggests that judicial review is appropriate under 47 U.S.C. 309(d)(1). This Section simply establishes the general procedure pursuant to which objections may be filed before the Commission, and thus is entirely irrelevant to the question of

whether petitioners have standing to seek judicial review of the Commission's decision in a court. As the court of appeals recognized, the decisive question is whether viewers are among the intended beneficiaries of the alien control restrictions in Section 310(b); petitioner offers no reason to reject the court of appeals' evaluation of the purpose and history of that provision, see Pet. App. 13a-14a. Petitioner's claim accordingly merits no further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused in these cases.

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